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No. 87-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENTS ULTRAPOWER, INC., AND GWF POWER SYSTEMS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents Ultrapower, Inc., and GWF Power Systems Company ("these Respondents") disagree with Petitioner's statement of the question presented. Petitioner's statement of the question assumes a fact not borne out by the evidentiary record, *i.e.*, that the prices Petitioner was ordered to pay were in excess of those permitted by the Public Utility Regulatory Policies Act of 1978. A proper statement of the question presented should be:

Did the California Supreme Court err when it declined to review a factual determination made by the California Public Utilities Commission pursuant to federal and state law?

THE PARTIES TO THIS PROCEEDING

The designation of the "Parties to this Proceeding" pursuant to Rule 21.1(b) contained in the Petition for Writ of Certiorari accurately sets forth those entities which submitted either the Petition for Writ of Review or Answers below to the California Supreme Court. The listing, however, does not include all of the entities who were entitled to notice of the proceedings before the California Supreme Court. Those entities include the following: Southern California Edison Company; San Diego Gas & Electric Company; Independent Power Corporation; Pacific Lighting Energy Systems; California Energy Commission; University of California; U.S. Wind Power, Inc.; Foster Wheeler Power Systems, Inc.; Howden Wind Parks, Inc.; BHC Inc.; California Cogeneration Council; Henwood Energy Systems, Inc.; Caterpillar Capital Company, Inc.; KKE & Associates; Pacesetter Energy Development; Waste Management of North America, Inc.; Water Energy Resource Consulting; Cogeneration Service Bureau; Trigen Energy; Bechtel Corporation; Pacific Hydro Power; Energy Factors; and MRW, Inc.

In addition to the entities listed above, the following entities also appeared before the California Public Utilities Commission on its approval of Interim Standard Offer No. 4 (which has been placed into issue by Petitioner herein): Geothermal Generation, Inc.; Pillsbury, Madison, & Sutro; Occidental Geothermal, Inc.; Herzog Contracting Corporation; San Diego Energy Recovery Project; McDonnell Douglas; University Energy; Resource Management International, Inc.; Toward Utility Rate Normalization; Independent Energy

Producers Association; Tosco Corporation; Applied Power Technology, Inc.; California Solid Waste Management Board; Sierra Energy and Risk Assessment; Natural Resource Defense Council; Natomas Company; California Manufacturers Association; California Hydro Systems, Inc.; Energy Consulting Group; Arco Solar, Inc.; Brown, Vence & Associates; Ebasco Services, Inc.; Thermonetics, Inc.; Sigma Group; Union Oil Company of California; Federal Paper Board, Inc.; Stanford University; American Energy Projects, Inc.; Stauffer Chemical Company; West County Agency; General Electric Company; Stone & Webster; Reed V. Schmidt; and Norman Ross Burgess. In addition to these entities, there may be others who also have standing as real parties in interest by virtue of the fact that such entities have contracted with Petitioner Pacific Gas & Electric Company under Interim Standard Offer No. 4. These Respondents, however, are currently unaware of the identity of such entities.

The following is provided pursuant to Rule 28.1. Respondent Ultrapower, Inc., is a wholly owned subsidiary of Ultrasystems Power and Environmental Systems, Inc., which in turn is a wholly owned subsidiary of Ultrasystems, Inc. The only subsidiary (other than wholly owned subsidiaries) and affiliate of Ultrasystems, Inc., is Micro Cogen Systems, Inc. Ultrasystems, Inc., owns 80% of the stock of Micro Cogen Systems, Inc. Respondent GWF Power Systems Company is a wholly owned subsidiary of Allied-Signal, Inc. Allied-Signal, Inc., has no subsidiaries or affiliates other than wholly owned subsidiaries. Allied-Signal, Inc., has entered into an agreement to sell 100% of the stock of GWF Power Systems Company to National Energy Partners, a partnership. To the

understanding of GWF Power Systems Company, CEA, Inc., owns 50% of the partnership interest in National Energy Partners and Harbart Contruction Company owns the other 50%. CEA, Inc., in turn is a wholly owned subsidiary of Public Service Corporation of New Jersey, a public utility. GWF Power Systems Company is not aware of any affiliate or subsidiary of Public Service Corporation of New Jersey other than CEA, Inc., and is not aware of any affiliate or subsidiary of Harbart Construction Company.

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Respondents Ultrapower, Inc. ("Ultrapower"), and GWF Power Systems Company ("GWF") respectfully submit this brief in opposition to the Petition by Pacific Gas & Electric Company ("PG&E") for a Writ of Certiorari.

STATEMENT OF THE CASE

PG&E asks this Court to review three electricity pricing decisions made by the California Public Utilities Commission (the "PUC" or the "Commission")

regarding the interpretation of a negotiated standard contract, Interim Standard Offer No. 4 ("SO4"), notwithstanding that these decisions were founded on years of Commission investigations, hearings, and negotiations with all affected parties. PG&E improperly requests that this Court substitute its judgment for that of the PUC and find that the Commission improperly weighed and balanced the policy considerations and evidence that underlie the decisions at issue.

For almost a decade the PUC has been investigating how properly to encourage the development of qualifying facilities[1] ("QFs") as alternatives to traditional petroleum and nuclear based power plants. These years of investigation developed most of the data and formulae used in SO4.

The process of developing SO4 began with Order Instituting Rulemaking No. 2 ("OIR 2"), issued by the PUC on September 3, 1980. OIR 2 initiated proceedings "for the purpose of establishing standards governing the prices, terms and conditions of electric utility purchases of electric power from qualifying cogeneration and small power production facilities." PUC Decision 82-01-103 (App., p. A-8). These proceedings included many Commission hearings, the acceptance by the Commission of public comments and petitions from utilities and QFs, several PUC staff reports, and a number of administrative law judge rulings. *Id.* (App., pp. A-8-9). The proceedings re-

[1] A "qualifying facility" is defined to be a cogeneration facility (*i.e.*, one which produces electricity and useful forms of thermal energy) or a small power production facility meeting certain criteria regarding size, fuel-use efficiency, and non-utility ownership. 18 C.F.R. §§ 292.101(b)(1), 292.202(c) (1986) (unless indicated, all references are to the 1986 version of the regulations).

sulted in two important PUC decisions in 1982: Decision 82-01-103 (App., p. A-1), issued on January 21, 1982, and Decision 82-12-120 (App., p. A-162), issued on December 30, 1982.

Decision 82-01-103 established two elements of a program to encourage the development of QFs. The first element was the standard offer system itself. Both the Public Utilities Regulatory Policies Act of 1978 ("PURPA") and California law require that utilities purchase electricity produced by QFs pursuant to terms set by the PUC. The PUC elected to establish such terms through the standard offer system. Under this system, standard contracts written by utilities are approved by the PUC. QFs can then sign a standard offer without further PUC review and any purchase by a utility pursuant to a standard offer is deemed *per se* reasonable. (App., p. A-27.) Decision 82-01-103 created this standard offer approach, and ordered the utilities to draft the initial standard offers pursuant to detailed instructions from the Commission regarding the provisions the standard offers should contain. Included in this Order was a description of what proved to be the prototype for SO4. (App., p. A-146.)

The second element set by Decision 82-01-103 was that pricing of electricity produced by QFs under these standard offers was to be based on PURPA's definition of "avoided costs," *i.e.*, the costs that the utilities would incur if they had to acquire the electricity from some source other than a QF or had to generate it themselves. (App., p. A-91.) *See* 18 C.F.R. § 292.101(b)(6). The PUC found that total avoided costs are made up of two elements: (1) "capacity costs," which are essentially the costs a utility incurs

to insure that it has enough capacity to always be able to provide sufficient electricity to its customers; and (2) "energy costs," which are the marginal costs of producing electricity and which consist mainly of the fuel the utilities would have to purchase to produce the electricity if it was not available from QFs. (App., pp. A-29-30.) The Commission decided that *all* standard offers would include pricing provisions based on these energy and capacity "components" to avoided costs.

Subsequently, in Decision 82-12-120, the Commission determined that the capacity component of avoided costs to a utility ("avoided capacity costs") was to be based on the cost of a combustion turbine. (App., pp. A-235-36, 285.) In that decision the Commission also determined that QFs should be provided a contract for the sale of capacity on a firm basis over a period of 30 years at a price equal to the utility's levelized avoided capacity costs. The specific figures to be used in calculating these costs were also approved by the Commission in Decision 82-12-120. (App., pp. A-294-95.)

One of the results of Decision 82-12-120 was the creation of Standard Offer No. 2 ("SO2"). SO2 included prices for as-available and firm capacity payments.[2] SO2 also included the methodology for calculating the energy prices which a QF signing that standard contract would receive. The energy prices

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[2] "Capacity" is measured in kilowatts and is the capability of producing energy. Capacity is "firm" if generating capability is assured during peak consumption periods. Capacity is "as-available" if the timing of generating capability is not so assured due to uncertain fuel availability, equipment outages, or inability or unwillingness of the QF to contractually commit to a firm capacity obligation.

were, however, subject to adjustments for variations in actual avoided costs which might occur during the term of that contract.

Shortly after SO2 was approved by Decision 82-12-120, it became apparent that there was a lack of certainty in its energy pricing provisions. Energy prices were subject to short term swings in avoided costs during the term of SO2, causing significant financing difficulties for QFs. The primary problem, recognized even by PG&E, was that lenders would not provide the necessary capital to finance a QF without a fixed income statement projection for the facility, which of course required fixed prices. Decision 83-05-038 (App., pp. A-306-07); Decision 83-09-054 (Pet. App., p. A-4). As a consequence, the PUC elected to begin work on a new standard offer which would in many ways be identical to SO2, but would also provide for fixed energy prices by making long term estimates of avoided costs which the parties would agree to honor regardless of fluctuations in actual avoided costs during the term of the contract.

The procedure the Commission selected for the preparation of the new standard offer was a negotiating conference. During this negotiating conference, representatives of the utilities, QFs, the Commission's staff, and an administrative law judge would attempt to agree on the terms of the new standard offer contract. Decision 83-05-038 (App., p. A-310). The conference was held for five weeks during the months of May and June, 1983, and resulted in an agreement among the parties on the fundamental provisions of the new contract, SO4. The utilities each then drafted their version of the contract, and submitted them to the PUC for approval. In Decision

83-09-054, issued in September of 1983, the Commission approved PG&E's version of SO4. Decision 83-09-054 (Pet. App., pp. A-44-45).

One major new feature of SO4 was the "fixed energy price" option. Under this concept, a QF could elect to have the first ten years of energy payments fixed. The estimates provided by the utilities for avoided energy costs would be guaranteed to the QF regardless of fluctuations in fuel costs during those first ten years of SO4. After the first ten years, energy prices would be allowed to fluctuate with actual, short term avoided energy costs. (Pet. App., pp. A-189, 210.) With regard to firm capacity, the parties agreed to incorporate the pricing methodology and assumptions utilized in calculating firm capacity prices that existed for SO2 contracts at the time SO4 was negotiated. As was the case in SO2 for firm capacity, annual capacity numbers under SO4 would be calculated for the entire term of the contract, those prices would then be levelized, and the QF would receive the levelized payment established for each year of SO4 as its firm capacity price. (Pet. App., pp. A-191, 234-40.) *See also* Decision 83-09-054 (Pet. App., p. A-22); Decision 85-04-075 (Pet. App., pp. A-101-02); Decision 86-10-038 (Pet. App., p. A-137). The "firm capacity" price schedule for SO4 was set out in Table E-2 (Pet. App., p. A-238) *or its successor* (*whichever was higher*), and SO4 specifically imposed on PG&E the duty to periodically publish a "schedule of the $/kw-year prices" that it offered to pay for firm capacity. (Pet. App., p. A-197.)

Another vital feature of SO4, as it was in SO2, is the provision in Article 12 allowing a QF *up to five years* from the date the contract is executed *to begin*

delivering energy to the utility. As a result, a QF signing SO4 in 1983 would have until 1988 to build its plant and commence energy deliveries (not 1987 as suggested by PG&E). (Pet. App., p. A-197.) In approving SO4, the Commission determined that it would remain in effect and available for execution "for at least six months, and until further order." Decision 83-09-054 (Pet. App., p. A-44). This period ultimately ended on April 17, 1985, when the Commission suspended SO4 in deference to a final version of the contract which was the subject of new Commission proceedings. Decision 85-04-075 (Pet. App., p. A-61).

Taken together, these time parameters mean that a QF could execute SO4 as late as April 1985 and would have *until April 1990* to begin delivering energy (again, not 1987 as urged by PG&E). To be complete, any SO4 executed in 1985 would need firm capacity prices based on energy delivery commencement dates through 1990 and fixed energy prices for up to and including all of a ten year period beginning in 1990, or *through year 2000* (not 1997 as contended by PG&E). This was recognized by the 1983 PUC decision that approved SO4: "The QF project must be on line *within 5 years* from the date the agreement is executed. However, the QF agrees to the payment stream, based on the forecast, when the contract is signed. This means utilities *must* have a *15-year* forecast *when the contract is signed* to allow for a maximum *five-year* hiatus before operation and payments start after execution." Decision 83-09-054 (Pet. App., p. A-19) (emphasis added).

At the time SO4 was approved by the PUC, it was everyone's understanding and expectation that the *estimates* which were agreed to as fixed prices would,

to some extent, turn out to be inaccurate; it was anticipated that actual, short-term avoided costs from time to time would vary from the estimates. However, for purposes of certainty, all parties accepted the risk that the estimates would be higher or lower than actual avoided costs at any given point in time in the future. Thus, Article 2 of SO4 states that "[a]ctual avoided costs at the time of energy and/or capacity deliveries may be substantially above or below the prices fixed in this agreement." (Pet. App., p. A-187.) At the time SO4 was approved, none of the utilities appealed or protested any of the pricing determinations made by the PUC.

After the approval of SO4 by the PUC, the utilities each issued their own version of that contract; but in each instance the capacity and energy tables were incomplete. For example, in PG&E's version of SO4 the energy price schedule (Table B-1) ended in 1997, not 2000, and the firm capacity table (Table E-2) ended in 1987 instead of 1990. (Pet. App., pp. A-210, 238.)

While this problem was raised in advance in some instances, many SO4s were signed with incomplete tables. Quite simply, some QFs did not focus on the problem at the time; others relied on the good faith of PG&E to comply with the provisions of SO4 to later update its pricing tables.[3] In any event, the problem came to a head in 1986 when the QFs who had signed such contracts approached the two main utilities involved, Southern California Edison and PG&E,

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[3] PG&E has a specific duty of good faith imposed on it in negotiating and interpreting SO4. Decision 82-01-103 (App., p. A-149).

to update the pricing tables. Southern California Edison quickly resolved the problem by extending the tables for the necessary number of years using the already established formulae. PG&E, however, refused to perform this contractually mandated and ministerial act, contending that it had no obligation to do so despite the fact that the entire pricing scheme, which had been developed during the five week negotiating conference, would not work without complete tables.

PG&E had no excuse for not completing these tables. In October 1985, just a few months before PG&E refused to extend the SO4 tables, it filed an application with the PUC requesting the Commission's approval of the extension of *the exact same tables* in SO2. (As noted above, the firm capacity pricing scheme used in SO4 is *identical* to that which was approved in 1982 for SO2.) At this time, the same problem of incomplete tables was being encountered with SO2, but PG&E took a different position on that issue due to its desire to execute more of the SO2 variable price agreements. For SO2, PG&E merely submitted an extended firm capacity price table to the Commission for its approval, which PG&E calculated using the existing formulae. PG&E's application states that extension of the table was "merely . . . a ministerial act." (App., p. A-318.) *Thus, at approximately the same time that PG&E contended it had no obligation under SO4 to extend the price tables, it was affirmatively seeking PUC permission to update the identical price tables in SO2 as merely ministerial.*

Some of the QFs who executed SO4 realized, at the time of execution, that the firm capacity and en-

ergy price tables being provided by the utilities were incomplete. PG&E responded to these individual QFs who focused on the problem by completing the tables in their specific versions of SO4, using the long-established formulae and data. *See* the Response of Foster Wheeler Power Systems, Inc., to Pacific Gas & Electric Company's Application for Rehearing of Decision 86-10-038 (App., p. A-320). There was no need for PG&E to seek further guidance or instructions from the PUC on how to complete the tables for the objecting QFs since all parties were familiar with the calculations and the relevant factors had been set and quantified since 1982. PG&E, however, failed to inform a single, nonobjecting QF of this problem, notwithstanding that other QFs had brought this issue to PG&E's attention.

After PG&E refused to extend the SO4 tables for the remaining QFs, the QFs who were affected by PG&E's refusal petitioned the PUC for an order that the tables be extended. The QFs pointed out that SO4 itself requires complete tables and that the methodology and formulae were already in place to allow the extension of the tables just as if complete tables had been provided in 1983.

The PUC agreed with the QFs, and, in the three decisions at issue here, Decisions 86-10-038, 86-12-013, and 86-12-104, required that PG&E complete the price tables. No such orders were necessary for Southern California Edison as it had already recognized the need to complete the tables and had done so. In the case of firm capacity prices, the PUC ordered that the tables be completed using the same methodology and factors which were used to generate the tables in 1983, *the same approach which had been*

in place ever since the Commission first resolved the capacity pricing issue in 1982. As the Commission explained, the "table is merely an expression of the values of the agreed-upon price proxy, the cost of a combustion turbine (CT), carried over all applicable years. The change due to escalation was thereby made merely ministerial." Decision 86-12-104 (Pet. App., p. A-146).

In the case of energy prices, however, the prices were based on PG&E's own fuel cost estimates and the negotiations of the parties in 1983. The Commission thus felt it unfair to increase the energy prices for the years which had to be added to the tables despite the fact that the tables established in 1983 showed an increase in costs each year. (Pet. App., pp. A-146-47.) Therefore, the Commission simply ordered that the energy price number for the year 1997, the last year of the table written in 1983, be used for the years 1998, 1999, and 2000. (Pet. App., p. A-147.) *In support of these orders, the Commission made findings of fact that the parties to SO4 intended that complete tables be provided so that the pricing provisions of the contract would function as intended, and that completion of the tables was merely a ministerial act which could be performed with the existing formulae.* Decision 86-10-038 (Pet. App., p. A-137); Decision 86-12-104 (Pet. App., pp. A-147-48).

On November 5, 1986, PG&E complied with Decision 86-10-038 by completing the firm capacity price schedule for SO4 without any further guidance or instructions from the Commission, thus again establishing the ministerial nature of the extension. Indeed, in the case of the firm capacity table (Table E-2), all PG&E had to do was extend for three years the table

that it wrote in 1983 using the escalation factors established by the Commission in 1982. For the energy price and as delivered capacity tables, PG&E merely followed the Commission's orders to include the same prices already in the tables for 1997 for the years 1998, 1999, and 2000.

On January 26, 1987, PG&E instituted an original proceeding before the California Supreme Court and filed its petition for a writ of review. Pursuant to Section 1758 of the California Public Utilities Code and Rule 58 of the California Rules of Court, Ultrapower and GWF timely answered that petition. The California Supreme Court summarily denied PG&E's petition on April 29, 1987.

SUMMARY OF ARGUMENT

Despite PG&E's attempt to unduly complicate this matter with various red herrings, the issues truly before the Court are straightforward and not particularly difficult.[4] This Court should deny PG&E's petition because it simply does not present a substantial federal question. Contrary to PG&E's claim that this case raises the issue of what PURPA re-

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[4] For example, the petition includes an entirely unsupported claim that, based on "current" estimates, the prices fixed by SO4 may exceed, all qualifying facilities considered, "actual" avoided costs by $1 billion. Petition, at 2. PG&E's contention borders on the absurd. The prices in SO4 were derived after extensive negotiations by all parties. There is no reason to believe that those numbers, agreed to and approved in 1983, are any less accurate than PG&E's current estimates. PG&E's "current estimate" of future avoided costs may change tomorrow depending, for example, on what events transpire in the Middle East.

quires in the absence of state authority on the pricing of QF power, this case involves only issues of fact and the interpretation of state law, an area ill suited for review by this Court. Furthermore, even if the Commission erred in its conclusion that the extensions in the SO4 price tables represented avoided costs as defined by PURPA (a fact question), this Court has decided that PURPA expressly authorizes the states to require utilities to pay for QF power on a basis other than avoided costs. Thus, the only issue would be whether California law permits such a result. This Court should not be tempted to render an advisory opinion as to whether California law should be interpreted, as a matter of that state's law, to authorize prices differing from avoided costs. The petition should be summarily denied.

ARGUMENT

PG&E's contention that the Commission's orders forcing PG&E to abide by the contractual obligations contained in SO4 violates PURPA is premised on the notion that the price table extensions ordered by the Commission do not represent prices based on current estimates of future "avoided costs." PG&E's PURPA argument suffers from three fatal flaws.

First, although PG&E acknowledges that the prices set forth in SO4 were *negotiated* by the parties to that contract, it ignores the fact that the regulations issued by the Federal Energy Regulatory Commission ("FERC") implementing PURPA expressly permit the parties to negotiate prices that differ from or even exceed actual avoided costs. As a result, all the Commission did in this case was resolve a very fact specific contractual dispute as to the intent of the parties

who negotiated those prices; the requirements of PURPA did not come into play at all.

Second, the negotiated prices set forth in SO4 represented the parties' best attempt to forecast long term avoided costs at the time PG&E's obligation to purchase that power was incurred. The FERC regulations expressly provide that the parties may set prices based on predictions of long term avoided costs, and the parties are not required to adjust those contractually set prices with every fluctuation in energy costs. That is precisely what the parties did in SO4. Whether the cost predictions in SO4 are avoided costs as defined in the FERC regulations or are otherwise reasonable is a question of fact within the PUC's jurisdiction.

Third, even if the prices set forth in SO4 exceeded the parties' estimates of long term avoided costs (which they do not), and even if the prices contained in SO4 did not result from negotiation (although they clearly did), the Commission could still order PG&E to pay those prices because the Commission is authorized to do so by a specific California statute, and this Court has held that such state statutes are not preempted by PURPA. Therefore, even if the Commission erred in resolving the contractual issue, and even if the negotiated prices do not accurately forecast future avoided costs, the PUC's actions do not violate any federal statute or regulation and therefore do not raise a substantial federal question.

I. PURPA Permits PG&E and Qualified Facilities to Agree on Prices Which Differ from Avoided Costs.

PG&E's PURPA argument ignores the fundamental fact that SO4 was the result of negotiations between

the utilities and QFs. Under FERC's regulations implementing PURPA, utilities and QFs are absolutely free to negotiate rates different from avoided costs:

> *Negotiated rates or terms.* Nothing in this subpart: (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms and conditions relating to any purchase, *which differ from the rate or terms or conditions which would otherwise be required by this subpart.*

18 C.F.R. § 292.301(b)(1) (emphasis added and in original); *see also American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) (holding FERC regulations permit parties to negotiate prices other than full avoided costs if consistent with policies of PURPA).

PG&E's argument that the prices added to the tables do not reflect PG&E's estimates of future avoided costs completely ignores this basic regulatory exception to PURPA's avoided cost rules. PG&E knew at the time it agreed to SO4 that the prices set forth therein would almost certainly either exceed or be below actual avoided costs at time of delivery. "The prices to be paid [to a QF] for energy and/or capacity delivered pursuant to [SO4] have wholly or partly been fixed at the time of execution. Actual avoided costs at the time of energy and/or capacity deliveries may be *substantially above or below the prices fixed in* [*SO4*]." SO4 (Pet. App., p. A-187) (emphasis added).

Thus, PG&E cannot argue in good faith that PURPA disallows the Commission's decision, based on a fact specific interpretation of contract negotia-

tions, that SO4 should contain the prices negotiated by the parties regardless of fluctuations in avoided cost projections that have occurred since SO4 was approved. Indeed, the very basis for SO4 was the notion that the parties would commit to fixed prices that would not be subject to alterations based on short term avoided cost swings, *an approach expressly authorized by the FERC regulations implementing PURPA*.

The correctness of the fact specific conclusions reached by the PUC when it resolved the parties' contract dispute is not a proper question for this Court's review. This Court has repeatedly refused to review specific factual findings underlying contract actions. "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, *or upon the construction of particular contracts or written instruments.*" R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 4.14 (6th ed. 1986) (emphasis added). Moreover, even when a petition for a writ of certiorari claims that "the cause involved [is] a grave question of vital importance to the public," if that "grave question" involves a question of fact, the Court is generally not moved to grant certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1923).

The Court is even more hesitant to grant certiorari when the findings of fact that it is asked to review involve those of a state administrative agency. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1955). "[A] state may enunciate policy through an administrative agency, as well as through its Courts, and so long

as there is an opportunity for judicial review the fact that such review may be denied on a discretionary basis does not make the agency's action any less the voice of the state for purposes of this Court's jurisdiction or for purposes of federal-state comity." *Pacific Telephone and Telegraph Co. v. Public Utilities Commission*, 443 U.S. 1301, 1304 (1979) (Rehnquist, J., opinion in chambers).

Under California law, that state's policy may be applied by the PUC, subject to discretionary review by the California Supreme Court. *See* Cal. Pub. Util. Code §§ 1757, 2821 (West 1975 & Supp. 1987, respectively). PG&E is complaining that, under California law, the evidentiary record before the PUC was not sufficient to permit the Commission to issue its three 1986 decisions. However, the best judges of the sufficiency of that record are the PUC and the California Supreme Court. Since the PUC and the California Supreme Court have already judged this matter, this Court should not waste its resources revisiting the question of the sufficiency of an evidentiary record under state law.

II. The Commission's 1986 Decisions Represent an Interpretation of the Parties' Best Estimates of Future Avoided Costs.

In issuing its three challenged decisions, the PUC relied on the vast evidentiary record created since 1980 relating to OIR 2 and the parties' intent in 1983. According to PG&E, when the dispute over the completion of the SO4 tables arose in 1986, the Commission was required to ignore this evidentiary background and to rely solely on 1986 data to determine whether the prices to be added to the tables were valid estimates of PG&E's future avoided costs.

Essentially, PG&E argues that the Commission should have used hindsight to take a second look at the parties' 1983 estimates of future avoided costs, adjusted the obligations incurred by PG&E in 1983 to reflect the data available in 1986, and adjusted the prices to be paid for the next ten to thirty years pursuant to SO4 based on that 1986 data. This position is contrary to the policies and requirements of PURPA, and has been flatly rejected by the courts.

Pursuant to PURPA, FERC promulgated Regulation 292.304, which sets the rates that a state may require a utility to pay a QF for energy purchased pursuant to PURPA. 18 C.F.R. § 292.304. Subsection (d)(2) of that Section provides that each qualifying facility shall have the option:

> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case, the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred.*

18 C.F.R. § 292.304(d)(2) (emphasis added). Thus, FERC regulations specifically authorize the PUC to approve prices based on estimates of future avoided costs "calculated at the time the obligation [of PG&E] is incurred." That is precisely what was done when SO4 was approved in 1983; *the parties agreed on and the PUC approved the prices to be paid as avoided*

costs regardless of subsequent market price fluctuations. The 1986 PUC decisions merely enforced the parties' 1983 agreement, and thus properly did not subsequently revise their agreement to take 1986 price forecasts into account.

The approach followed by the PUC was approved by the Idaho Supreme Court in *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984). Afton Energy, a cogenerator of electricity in Idaho, petitioned the Idaho Public Utilities Commission ("IPUC") for an order requiring a utility, Idaho Power Company, to enter into a long term, fixed price contract to purchase energy from Afton. Although Afton and Idaho Power had been able to agree on most of the proposed contract terms, there remained a dispute over a provision requiring the IPUC to periodically monitor the prices in the agreement and to adjust those prices if avoided costs increased or decreased. The IPUC ruled that it would order the parties to execute the contract, but that it would not maintain jurisdiction to adjust the prices initially set by the contract.

The Idaho Supreme Court affirmed the IPUC's decision. The court held that Idaho Power's contention that the IPUC was required to monitor the prices in the agreement to ensure that those prices were just and reasonable in the future was inconsistent with the policy, intent, language, and FERC implementation of PURPA. The court pointed to the public comments made by FERC at the time its regulations were adopted which stated that avoided costs calculated at the time an obligation is incurred should be maintained for the duration of the contract. Section 292.304(b)(5) of the FERC Regulations provides that,

in the case of contracts to deliver energy at a future date, "the rates for such purchases do not violate the subpart if the rates for such purchases differ from avoided costs at the time of delivery." 18 C.F.R. § 292.304(b)(5). According to the court: "The import of this Section [292.304(b)(5)] is to insure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefit of its commitment as a result of changed circumstances . . . . This subparagraph will thus insure the certainty of rates for purchases from a qualifying facility which enters into a commitment to deliver energy or capacity to a utility." *Afton Energy, Inc. v. Idaho Power Co., supra,* 693 P.2d at 434, *quoting* Preamble to FERC's Regulations, 45 Fed. Reg. 12,214, 12,224 (1980). "Thus we reject Idaho Power's argument that the [IPUC] does not have any authority to establish an avoided costs rate which is fixed for the duration of the contract and which is not subject to the [IPUC's] continuing jurisdiction. It is clear that both Congress and FERC, through its implementing regulations, intended that [QFs] should not be subjected to pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the [IPUC]." *Afton Energy, Inc. v. Idaho Power Co., supra,* 693 P.2d at 434.

PG&E's argument that PURPA required the PUC to examine 1986 price forecasts when it ordered the price tables contained in SO4 extended is directly contrary to these PURPA sections, FERC regulations, and case authority. When SO4 was approved in 1983, PG&E incurred the obligation to honor the prices established at that time regardless of fluctuations in actual avoided costs, an approach expressly authorized

by PURPA. When it was discovered that some "blanks" had been left in the contract, the Commission correctly interpreted the parties' intent to rely on the pricing methodologies agreed to during the 1983 negotiations and extended the price tables accordingly. The entire pricing mechanism for SO4 was established by the parties and the PUC in 1983 and before, and thus the data and information available at the time the parties mutually agreed to a pricing formula must govern the interpretation of SO4. Again, this resolution by the PUC of a factual dispute surrounding the intent of the parties is not one calling for the exercise of this Court's review. No substantial federal question is raised.

Moreover, PG&E's assertion that its current estimates of future avoided costs are more accurate than the estimates found in SO4 is unfounded. When the parties negotiated SO4 in 1983, everyone realized that there was uncertainty associated with predicting the avoided costs that would be incurred by the utilities over the next 30 years. However, the parties were able to reach an acceptable compromise as to those estimates based on the pricing mechanisms already adopted and approved in SO2. There is no reason to believe that those estimates will end up being any less accurate than PG&E's current estimates 30 years down the road. As the PUC stated, evaluating PG&E's data "requires a crystal ball. The fact is, neither we, nor PG&E, nor the QFs know whether the escalation factors in Table E-2 will prove higher or lower than the change in costs of a combustion turbine, or than inflation generally." Decision 86-10-038 (Pet. App., p. A-135). There is therefore no reason to favor PG&E's 1986 estimates over the prices

added to the tables pursuant to the formulae in place and data available in 1983.

Finally, PG&E's argument would frustrate PURPA's policy of promoting alternative energy sources. *The decrease in PG&E's 1986 avoided cost estimates, on which PG&E relies so heavily, resulted in large part from the increased availability of energy created by the response of QFs to SO4.* Decision 85-04-075 (Pet. App., pp. A-94-95, 99). Inherent in the calculation of avoided capacity costs is the total amount of capacity necessary to ensure that no energy shortage occurs. Thus, as the predicted amount of available capacity approaches the total amount needed, per unit avoided costs decrease. *Therefore, it is precisely because many QFs executed SO4 that avoided cost estimates decreased from 1983 to 1986.* (Pet. App., p. A-99.)

PG&E cannot honestly claim that it is now entitled to walk away from the deal that it negotiated in 1983 because that deal was successful and was executed by many QFs in the ensuing 19 months. If PG&E's argument is accepted, then the response to any successful program to promote alternative energy could be used to abrogate the fixed price provisions of that program, *thereby frustrating the intent of the parties and the goals of PURPA.* PG&E simply cannot rely on changed circumstances in an attempt to argue that the Commission erred in ordering that prices consistent with the 1983 contracts be added to the price tables.

III. The Commission May Set Prices Different from Avoided Costs.

In its brief to the California Supreme Court, PG&E seemed to argue that PURPA and the FERC regu-

lations implementing PURPA constitutionally preempt the Commission's statutory authority to set prices exceeding avoided costs. Although not entirely clear, PG&E now seems to concede that PURPA, based on the New York Court of Appeals' decision in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 63 N.Y.2d 424, 472 N.E.2d 981, 483 N.Y.S.2d 153 (1984), as affirmed by this Court, 470 U.S. 1075 (1985) (appeal dismissed for want of a substantial federal question), allows the states to authorize payments to QFs exceeding avoided costs. However, PG&E now argues that Section 2821 of the California Public Utilities Code does not go as far as the New York statute did, and therefore the Commission erred because it set prices in excess of avoided costs. There is simply no merit to PG&E's argument because the plain language of Section 2821 clearly authorizes the Commission to set any price, including prices in excess of avoided costs, and that such prices shall be deemed "reasonable and prudent for all purposes." Cal. Pub. Util. Code § 2821 (West Supp. 1987). More importantly, however, the reach of the California statute is a matter of state law upon which this Court should not pass.

A. PURPA Permits States to Set Prices in Excess of Avoided Costs.

In *FERC v. Mississippi*, 456 U.S. 742 (1982), this Court addressed the constitutionality of PURPA and the FERC regulations promulgated thereunder, challenged on interstate commerce and Tenth Amendment grounds. This Court held that PURPA was enacted pursuant to congressional authority under the Commerce Clause, 456 U.S. at 753, and that "Congress was not irrational in concluding that limited federal

regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to protect interstate commerce." 456 U.S. at 758. With regard to the challenge based on the Tenth Amendment, this Court held that Congress could have preempted the entire field of utilities regulation, but that it chose not to do so and instead had imposed on the states the burden of enforcing federal policies in addition to their normal function of regulating state utilities. 456 U.S. at 760-61. Since Congress did not expressly or impliedly preempt the entire field of utilities regulation, only if the PUC's orders directly conflict with or prevent enforcement of PURPA would those orders give way under constitutional principles. The Commission's 1986 decisions interpreting SO4, however, do not conflict with federal law because PURPA and the FERC regulations permit states to encourage the development of cogeneration and small power production facilities to an even greater extent than federal law.

In *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 63 N.Y.2d 424, 472 N.E.2d 981, 483 N.Y.S.2d 153 (1984), *appeal dismissed*, 470 U.S. 1075 (1985), the New York Court of Appeals specifically addressed the issue whether a New York state law which set a price in excess of avoided costs for energy produced by QFs violates PURPA. In answering that question, the court held that PURPA and the FERC regulations permit, and even encourage, complementary state regulation of contracts between QFs and utilities, and upheld the New York statute.

The New York court first examined the language of PURPA and concluded that the rules promulgated

by FERC were limited to enforcing the *federal* statute. 472 N.E.2d at 985. When it issued its regulations, FERC explained that complementary state regulation "was not supplanted by PURPA but could be used to *expand* the Federal PURPA-based incentive." 472 N.E.2d at 985 (footnote omitted; emphasis added). "While the rules prescribed under Section 210 of PURPA are subject to the statutory parameters, *the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these* [*alternative energy*] *technologies* . . . . In such a case, however, the higher rates would thus be based on State authority to establish such rates, and not on the [FERC] rules." 472 N.E.2d at 985-86, *quoting* Preamble to FERC Regulations, 45 Fed. Reg. 12,214, 12,221-22 (1980) (emphasis added).

Moreover, the New York Court of Appeals recognized that complementary state regulation setting prices in excess of avoided costs would actually promote the policies embodied in PURPA. The primary goal underlying the enactment of PURPA was to encourage the development of alternative energy projects such as cogenerators and small power production facilities. *See FERC v. Mississippi, supra*, 456 U.S. at 750. A state which promotes these alternative sources of energy by permitting its regulatory agency to set prices in excess of avoided costs is simply promoting the same policy with more vigor, and consequently does not violate the federal law. *Consolidated Edison Co. v. Public Service Commission, supra*, 472 N.E.2d at 986. "The State statute [setting prices in excess of full avoided costs] does not hinder the Federal objective; it furthers it, by enhancing the bar-

gaining position of the alternate energy developer through a predictable, guaranteed rate of $.06 per kilowatt hour . . . . The stability provided by the Public Service Law to the alternate energy producers reduces the perceived risk of a project, encourages investment, and facilitates financing." 472 N.E.2d at 986.

In 1985 this Court dismissed an appeal of *Consolidated Edison Co. v. Public Service Commission*, *supra*, for want of a substantial federal question. *Consolidated Edison Co. v. Public Service Commission of New York*, 470 U.S. 1075 (1985). Such a dismissal is deemed a determination on the merits of the preemption question. *See Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975); C. Wright, Law of Federal Courts 757-58 (4th ed. 1983) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"); R. Stern, E. Gressman & S. Shapiro, *supra*, § 4.28.[5]

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[5] The Kansas Supreme Court's preemption decision in *Kansas City Power & Light Co. v. State Corp. Commission*, 234 Kan. 1057, 676 P.2d 764 (1984), was clearly rejected by this Court, and is seriously flawed because the Kansas court failed to consider the legislative history of PURPA and FERC's statements in adopting regulations to implement PURPA. Instead, the Kansas Supreme Court relied on dicta in *American Paper Institute v. American Power and Light Co.*, 461 U.S. 375 (1983), a case involving a constitutional challenge to FERC's regulations, not complementary state law. *Kansas City Power & Light v. State Corp. Comm'n*, *supra*, 676 P.2d at 766 (*quoting American Paper Institute*, *supra*). Finally, the Kansas Supreme Court failed to consider that state law establishing prices for purchase of QF power would further *promote*, not hamper, the goals of PURPA. Given its defects, and this Court's dismissal of the appeal of

After the New York Court of Appeals rendered its decision in *Consolidated Edison Co. v. Public Service Commission, supra,* FERC issued a decision reaffirming the statements in the Preamble to its rules relied upon by the New York Court of Appeals. In *Middle South Services, Inc.*, 33 FERC (CCH) ¶ 61,408 (Dec. 23, 1985), FERC held that a state determination of full avoided costs which involves methodologies different from those used by FERC does not create a conflict between state and federal law, and that FERC should defer to the state determination because Congress gave implementation responsibilities to the individual states. *Id.*, 33 FERC at 61,788-89. Moreover, FERC held that a state, pursuant to its own laws, may set rates *in excess* of avoided costs to further promote alternative energy production within that state. *Id.*, 33 FERC at 61,789. *Thus, it is absolutely clear that PURPA allows states the authority to set prices above avoided costs; PURPA sets only a floor for rates, not a ceiling.*[6]

Consolidated Edison, the Kansas court's decision is not persuasive on any point and hardly represents a "conflict" with the decision in *Consolidated Edison.*

[6] This is further established by *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), which, based on language in PURPA, FERC's regulations thereunder, the Supreme Court's decision in *FERC v. Mississippi, supra*, and the New York Court of Appeals' decision in *Consolidated Edison Co. v. Public Service Comm., supra*, holds that PURPA was not intended to preempt complementary state law promoting alternative energy production. *Id.*, 643 F. Supp. at 1384; *see also* Lock, *Statewide Purchase Rates Under Section 210 of PURPA*, 3 Solar Law Rep. 419, 446-50 (1981).

B. PG&E's Petition Improperly Seeks an Interpretation of State Law by this Court.

At its end, PG&E's petition appears to admit that PURPA permits a state statute to authorize prices in excess of avoided costs. However, PG&E then asks this Court to examine the relevant California statutory provision, California Public Utilities Code Section 2821, to determine if it, like the New York statute at issue in *Consolidated Edison*, permits the PUC to set prices in excess of avoided costs.[7] PG&E fails to recognize that this Court has repeatedly held that it will not review a state determination of state law. "The Supreme Court has consistently developed its powers with respect to state law from the assumption that generally jurisdiction to review federal question cases does not extend to resolution of state law questions that are also presented." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice

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[7] These Respondents completely disagree with PG&E's interpretation of Section 2821 of the California Public Utilities Code. PG&E's statutory construction argument focuses on the first paragraph of that Section enacted in 1980. PG&E totally ignores the second paragraph adopted in 1983, 1983 Cal. Stats., ch. 868, § 3 (West 1983), and its legislative history. This second paragraph focuses on "prices" and gives the PUC the power to determine "prices" as "reasonable and prudent for all purposes." Cal. Pub. Util. Code § 2821 (West Supp. 1987). The language in question was introduced as an amendment to Assembly Bill No. 1942 by the State Senate on July 8, 1983. (App., p. A-333.) The analysis of Assembly Bill No. 1942 prepared by the State Senate Committee on Energy and Public Utilities clearly shows that the amendment was included to specifically sanction what the PUC was doing under OIR 2 and to confirm that the prices approved pursuant to that procedure or otherwise would be deemed fair and reasonable for all purposes. (App., pp. A-334-36.)

and Procedure: Civil § 4019 at 661 (1977); *see also Murdock v. City of Memphis*, 87 U.S. 590, 626-33 (1875). Thus, although this Court has jurisdiction to examine the precise scope of the federal statute involved and the room left for legislation by the state, this Court generally leaves to the state the question of whether its statute falls within the area permitted by the federal law. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra*, § 4021; *see also Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 396 (1983) (holding that state was free to regulate wholesale rates for energy charged by a rural electric company).

This Court's disinclination to review a state's construction of its own statutes seems especially well founded in this case because California law (apparently unlike that of other states) specifically empowers the PUC to make findings of fact and issue administrative decisions, just as it did here, subject only to a very narrow scope of review by the California Supreme Court. Cal. Pub. Util. Code § 1757 (West 1975); *City and County of San Francisco v. Public Utilities Commission*, 39 Cal. 3d 523, 530, 703 P.2d 381, 217 Cal. Rptr. 43 (1985). The California Supreme Court refused under California law to "second guess" the PUC's decisions; this Court should do likewise.

CONCLUSION

In summary, the Commission's interpretation of federal law, as clearly set forth in the FERC regulations and in this Court's decisions, does not raise a substantial federal question. Furthermore, when one examines PG&E's request in the latter portions of its

petition, it becomes even more clear that state law issues of fact and contract law predominate over the specious federal statutory question that PG&E attempts to raise. For these and all the reasons stated above, PG&E's Petition for Writ of Certiorari should be denied.

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